Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	
Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards	)	

REPLY COMMENTS OF KMC TELECOM AND NUVOX COMMUNICATIONS

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SUMMARY

KMC Telecom, Inc. and NuVox, Inc. (collectively, "the Joint Commenters") observed in their initial comments that, in contrast to the view of the Notice in this proceeding, the issue of regulatory treatment of wireline Internet access is not a case of first impression. The record shows that many other parties made this same observation – namely, that the Commission has, on many occasions in the past, held that advanced services, such as xDSL-based access to the Internet, are telecommunications services subject to regulation under Title II of the Communications Act.

The record demonstrates that no change has occurred in the law or the facts that would justify a departure from the Commission's prior precedent. Moreover, recent developments occurring after the comment deadline serve only to reinforce the Joint Commenters' views and to undercut further the proposals contained in the Notice. For instance, in *Verizon v. FCC*, no less an authority than the Supreme Court stated that the current regulatory framework has brought about an enviable level of investment in telecommunications facilities. The Supreme Court also emphasizes that Congress intended in the Act to place *additional* restrictions on Incumbent Local Exchange Carriers ("ILECs"), and that negligible intermodal competition exists for bottleneck elements that the ILECs control. Echoing arguments made by the Joint Commenters, *Verizon v. FCC* rejects regulatory parity as a permissible statutory goal, and casts doubt on the idea that intermodal competition can constrain ILEC misbehavior.

In addition, the purported factual basis for the Notice's proposed conclusions – that broadband deployment can be increased by exempting ILECs from

regulations designed to curb their market power – conflicts with the record of this as well as the ILEC Broadband proceeding, and with decades of existing law. This body of law provides that every information service does indeed have at its heart a telecommunications component, and that unaffiliated carriers must be permitted nondiscriminatory access to the telecommunications component in order to prevent harm to competition and consumers. The record provides no support for overturning these largely successful policies requiring nondiscriminatory access to the ILECs' bottleneck facilities. The record also demonstrates that broadband deployment is adequate, and that drastic action such as that proposed in the Notice is not needed – and will be unsuccessful – in spurring further broadband deployment.

Verizon v. FCC and the record of this proceeding make clear that continued regulation of ILEC provision of broadband under Title II remains a necessity, and that ILEC arguments concerning regulatory parity and the sufficiency of intermodal competition must be rejected. Nonetheless, should the Commission make the mistake of adopting its tentative conclusions from the Notice, the Joint Commenters urge the Commission not to compound this error by interpreting the conclusion to prevent CLECs and others from obtaining unbundled network elements ("UNEs"). Rather, the Joint Commenters agree with AT&T, MCI and others, that it is the *requesting carriers'* use of a UNE that determines whether a UNE shall be available, and if requesting carriers intend to provide at least some telecommunications services by using a UNE, those carriers should be permitted to obtain the UNE and to use it for all purposes.

TABLE OF CONTENTS

Page

SUMMARY i

I. INTRODUCTION AND BACKGROUND 2

II. THE RECORD CONTAINS NO SUPPORT FOR THE DRASTIC DEVIATION FROM PRIOR POLICY PROPOSED BY THE NOTICE 6

A. The Majority of Commenters Believe The Commission's Proposals Would Be Disastrous for Competition and Consumers 6

B. The Supreme Court Has Now Weighed In, Ruling that the Current Regulatory Framework Has Resulted in an Enviable Level of Investment 8

C. The ILECs Continue to Rack Up Fines for Noncompliance with Existing Rules, and to Discriminate Unlawfully Against Their Competitors, Proving that Regulatory Safeguards Remain Necessary 9

D. The Drastic Change in Policy Proposed in the Notice Would Not Withstand Judicial Scrutiny 9

III. THE COMMISSION'S PROPOSED INTERPRETATION CONFLICTS WITH THE ACT'S STRUCTURE AND PURPOSE, AS IT THREATENS TO MAKE CENTERPIECE PROVISIONS OF THE ACT SUCH AS SECTIONS 251 AND 255 OBSOLETE 11

IV. THE SUPREME COURT'S RECENT DECISION IN VERIZON V. FCC COMPELS REJECTION OF THE ILECS' REGULATORY PARITY ARGUMENTS 13

A. Congress Intended for ILECs to Be Subject to Additional Regulation in Order to Make Competition Possible 13

B. The ILECs' Claim that they Are Subject to Disproportionate Regulation is Demonstrably False 16

C. ILEC Regulatory Parity Arguments Must Be Rejected Because the Commission's Role Is To Foster Competition, and Not To Aid Individual Competitors Such As The ILECs 17

D. The ILECs are Not Entitled to a Risk-free Environment for Deploying Broadband 18

V. THE SUPREME COURT DEBUNKED THE IDEA THAT INTERMODAL COMPETITION IS SUFFICIENT TO PROTECT CONSUMERS 19

TABLE OF CONTENTS

Page

VI. THE NOTICE'S PREMISE THAT DEREGULATION OF THE ILECS WILL LEAD TO INCREASED BROADBAND DEPLOYMENT IS CONTRADICTED BY THE RECORD OF THIS AND OF THE ILEC BROADBAND PROCEEDING 22

A. The History of RBOC Capital Expenditures Demonstrates That Enforcing the Rules of Fair Competition is a Proven Way to Incent Deployment of Facilities 23

B. Using Deregulation as a Quid Pro Quo to Incent Deployment Will Not Work, as ILECs Routinely Break Promises Made In Return for Deregulation 24

C. The ILEC's Claim That They are "Newcomers" to Broadband is Frivolous 26

VII. AS MANY COMMENTERS HAVE CORRECTLY OBSERVED, UNDER THE 1996 ACT, THE AVAILABILITY OF UNES IS DEPENDENT ON HOW THE REQUESTING CARRIER USES THE UNES AND NOT ON HOW THE ILEC USES THEM 29

VIII. CONCLUSION 31

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REPLY COMMENTS OF
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KMC Telecom, Inc. and NuVox, Inc. (collectively, "the Joint Commenters"), through their attorneys, hereby file these reply comments urging the Commission *not* to adopt the tentative conclusions, contained in its recent *NPRM*[1], that wireline broadband Internet access services are information services subject to regulation under Title I of the Telecommunications Act of 1996 ("the Act"). The record indicates that many commenters made the same observation as the Joint Commenters, namely, that far from being a case of first impression, the Commission has, on many occasions in the past, held that advanced services, such as xDSL-based access to the Internet, are telecommunications services subject to regulation under Title II of the Act. The

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1 *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket No. 02-33, CC Dockets Nos. 95-20, 98-10 (rel. Feb. 15, 2002) (NPRM or Notice).

record demonstrates that no change has occurred in the law or the facts that would justify a departure from the Commission's prior precedent. As many commenters observed, this Commission cannot and should not aid the Incumbent Local Exchange Carriers' ("ILECs'") efforts to evade Title II obligations placed upon them by Congress. To avoid engaging in arbitrary and capricious action, this Commission must reject its tentative conclusions from the Notice and reaffirm its prior holdings.

I. INTRODUCTION AND BACKGROUND

The record assembled in response to the Notice reinforces KMC and NuVox's position that adoption of the Notice's tentative conclusion would be a disaster for competition and consumers, and would actually work against the Commission's goal of increasing broadband deployment. The Commission's proposal is a drastic one, and commenters from all quarters – from competitive providers, state commissions, the FBI and Department of Justice, to ordinary citizens – have not minced words in their criticism of it.

Moreover, developments that occurred after the comment deadline serve to reinforce the Joint Commenters' views. The Supreme Court recently issued the authoritative interpretation of the Act which added force to the arguments of CLECs and undercut those of the ILECs. In *Verizon Communications Inc. v. FCC*, No. 00-511, slip. op., 535 U.S. ____ (U.S. May 13, 2002), the Supreme Court rejected "regulatory parity" as a permissible goal of the statute, and debunked the idea that intermodal competition currently is sufficient to protect consumers and competitors from the exercise of ILEC market power. The D.C. Circuit also issued an order, *U.S. Telecom Ass;n v. FCC*, No. 00-1012, slip op. (D.D.C. May 24, 2002), that most would agree directly conflicts with *Verizon v. FCC* in its reasoning and approach to implementing the Act.

However, to the extent the D.C. Circuit's vision of competition conflicts with the Supreme Court's interpretation of the Act, *USTA v. FCC* must be given no weight by this Commission.

As the record demonstrates, the Notice's proposed conclusions represent bad law, bad policy, and the purported factual basis for proposed conclusions – that broadband deployment can be increased by exempting ILECs from regulations designed to curb their market power – conflicts with the record of this as well as the ILEC Broadband proceeding. Adopting the Notice's tentative conclusions would represent bad law because, as numerous commenters point out, the Notice's proposals conflict with decades of existing law. That law made clear that every information service did indeed have at its heart a telecommunications component, and that unaffiliated carriers must be permitted nondiscriminatory access to this component in order to prevent harm to competition and consumers. The record of this proceeding provides no support for overturning these largely successful policies requiring nondiscriminatory access to the ILECs' bottleneck facilities.

No less an authority than the Supreme Court has stated that the current framework has brought about an enviable level of investment in telecommunications infrastructure and facilities. Now is not the time to discard this successful framework only to "start from scratch." As the Commission itself recognized in its recent 706 Report, broadband deployment is not "broke." The Commission will be tempting fate – as well as endangering the broadband deployment that already has occurred – if it attempts to "fix" it with the Notice's wrongheaded policy proposals.

Based on the comments that have been submitted and developments occurring since the initial comment deadline, the Joint Commenters urge the Commission to reject the proposals contained in the Notice, as set forth below:

Verizon v. FCC requires the Commission to reject the ILEC's "regulatory parity" arguments. In addition to the record evidence supporting the Joint Commenters' positions, the Supreme Court also recently weighed in on the side of competition: *Verizon v. FCC* made clear that Congress' goal in the 1996 Act was to *enable* competition, and not to throw roadblocks in competitors' paths, as the Notice proposes to do. In *Verizon v. FCC* the Supreme Court also rejected the idea that the ILECs are entitled to "regulatory parity." Rather, each type of carrier is intended to be regulated in a particular way under the Act, with ILECs in particular, singled out – *by Congress* – for *additional* obligations.[2] Accordingly, the Commission must reject the ILECs' regulatory parity arguments.

The Claim that Drastic Action Is Needed to Encourage Broadband Deployment Conflicts with the Record Evidence, the Commission's Own Recent Findings, and with Verizon v. FCC. As the Joint Commenters observed in their comments in the ILEC broadband proceeding, the Commission itself recognized in its most recent Section 706 report that broadband is being deployed at an acceptable pace.[3] The Supreme Court recognized that the

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2 "The Act . . . proceeds on the understanding that incumbent monopolists and contending competitors are *unequal*," and are expressly given additional obligations by Section 251. *Verizon v. FCC*, 535 U.S. __ , slip op. at 63.

3 *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-1476, 17 FCC Rcd 2844, ¶ 1, (rel. Feb. 6, 2002) ("706 Report").

current regulatory regime achieved significant investment in facilities.[4] And, as shown by the Joint Commenters and others, deployment of broadband facilities by ILECs had nothing to do with the presence or absence of regulations. Rather, ILECs let xDSL technology sit on the shelf, and deployed it when faced with a competitive threat to their operations from CLECs.

As the Supreme Court recognized, that the ILECs would deploy their own facilities in response to a competitive threat is a matter of pure "commonsense."[5] A Commission decision that would reject this commonsense view in favor of granting unneeded and unlawful regulatory favors to the ILECs – a strategy which already has been tried and failed by many regulators in the past[6] – would conflict with commonsense, and would result in harm to competition and consumers.

The Commission must recognize that Verizon v. FCC reinforced the idea that the Act is intended to foster intramodal competition, and debunked the idea that intermodal competition is sufficient to protect consumers. The Notice places great emphasis on the idea of intermodal competition justifying a relaxation of Title II's requirements. In addition to discrediting the ILECs' regulatory parity arguments, *Verizon v. FCC*, using the latest Commission figures, also noted that intermodal competition barely exists. It stands to reason that the existence of such competition therefore cannot be relied upon to restrain ILEC behavior and to protect consumers.[7]

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4 *Verizon v. FCC.* at 45.

5 *Id.* at 46.

6 *See Joint Comments of KMC Telecom and NuVox Communications,* 28-29; Joint Comments of Cbeyond and NuVox in ILEC Broadband Proceeding, CC Docket No. 01-337, at 25-26 ("ILEC Broadband Proceeding Comments").

7 *Verizon v. FCC*, slip op. at 17, 49.

The Commission must recognize that how the ILEC uses a particular facility should have no effect on the ILECs' unbundling obligations under Section 251, and the relevant inquiry should concern how the requesting carrier intends to use the facility. As stated above, the Joint Commenters join many others in arguing that the Notice's tentative conclusion is wrong on the law, wrong on the facts, and wrong as a policy choice. However, even if the Commission makes the mistake of adopting its tentative conclusions from the Notice, the Joint Commenters urge the Commission not to compound this mistake by interpreting the conclusion to prevent CLECs and others from obtaining UNEs. Rather, as explained below, the Joint Commenters agree with AT&T, MCI and others, that it is the *requesting carriers'* use of a UNE that determines whether a UNE shall be available, and if requesting carriers intend to provide at least some telecommunications services by using a UNE, those carriers should be permitted to obtain the UNE and use it for all purposes.

II. THE RECORD CONTAINS NO SUPPORT FOR THE DRASTIC DEVIATION FROM PRIOR POLICY PROPOSED BY THE NOTICE

The record of this proceeding overwhelmingly counsels that the Commission should reject the proposals put forth in the Notice. As the Joint Commenters showed in their ILEC Broadband proceeding comments, the Commission's proposals are once again a solution in search of a problem. The Commission itself recognized that broadband currently is being deployed adequately.[8] The Supreme Court itself cited with approval to the record of deployment of facilities and investment that has occurred under the current regulatory framework. As shown further below, past history shows that the "solutions" proposed by the ILECs to the alleged

[8] *See 706 Report* at ¶ 1.

problem of lack of deployment of broadband have been proven not to work. Put quite simply, no support exists in this record for the drastic loosening of regulatory safeguards and deviation from prior policy proposed in the Notice.

A. The Majority of Commenters Believe The Commission's Proposals Would Be Disastrous for Competition and Consumers

Many commenters, from state commissions, competitive LECs and Internet Service Providers ("ISPs"), to individual citizens, pointed to the disastrous effects likely to occur if the Commission unwisely and prematurely decides to remove and restrict the competitive safeguards – such as the *Computer Inquiries* rules and Section 251 unbundling obligation – put in place by the Act and prior Commissions. For instance:

The Ohio PUC called the Commission's tentative conclusion that a provider of broadband Internet access service does not offer a telecommunications service" because it "offers the ability to establish 'home pages' or store files" tenuous as a matter of logic," and "legally fragile." The Ohio PUC stated that such a finding fosters a "significant potential for abuse and manipulation," representing "neither sound logic nor reasonable policy." Ohio PUC at 18-19.

The Department of Justice and FBI stated that adoption of the tentative conclusions contained in the Notice could "seriously, if not fatally, weaken CALEA's important public safety, law enforcement, and national security underpinnings," DoJ/FBI at 2-3, and would lead to the "absurd" results, such as excluding from regulation ordinary telephone facilities and services used by customers for traditional "dial up" narrowband service. DoJ/FBI at 11-12.

The California PUC stated that "[t]he FCC fails to demonstrate that Congress, on one hand, intended to exempt an ILEC from the provisions of Title II when it bundles DSL service with its own ISP services, but on the other hand, intended to regulate an ILEC under Title II when it sells unbundled DSL services directly to third parties. No such dichotomy exists either in the language, the structure or the policy of the Act, and indeed the opposite is true . . . the FCC has repeatedly recognized that broadband access services provided by wireline carriers qualify as "telecommunications services." California PUC Comments at 24.

The Notice already has created regulatory uncertainty at no small cost to those who would dare to compete with the ILECs, and adoption of the tentative conclusions would lead to years of litigation. The likely result of such litigation is that the Commission's ruling would be overturned. No court is likely to find reasonable an interpretation of the Act that renders the key market opening provisions of Section 251 as mere surplusage, and this is even more true in light of *Verizon v. FCC.*

Instead of deleting protections already expressly included in the statute, as the Commission has proposed to do, the Act calls for the Commission to imply additional protections for competitive providers.[9] If the Notice's proposals are adopted and somehow survive appellate review, it will represent a bad policy that favors one industry segment over another, forestalls competition, and deprives consumers of affordable broadband. However, in the likely event that the policy is struck down by the courts, competitors' business plans will have been unreasonably delayed, broadband deployment will suffer, and consumers will once again pay the price – in this case literally – as ILECs will be free to maintain the same high

prices they charge today for broadband access, and which have led to fewer consumers purchasing broadband.

B. The Supreme Court Has Now Weighed In, Ruling that the Current Regulatory Framework Has Resulted in an Enviable Level of Investment

The record shows that no broadband crisis exists that would justify the loosening of standards designed to curb ILEC market power and the abandonment of years of settled law concerning advanced services. The Commission itself recognized that broadband deployment was adequate in its 706 Report. The Supreme Court wrote that the current regulatory framework produced an admirable record of investment in facilities.[10] In contrast, the Commission's proposed approach, relying on the "honor system" of deregulation to fulfill ILEC promises of deployment, has a proven record of failure.[11]

C. The ILECs Continue to Rack Up Fines for Noncompliance with Existing Rules, and to Discriminate Unlawfully Against Their Competitors, Proving that Regulatory Safeguards Remain Necessary

The record of this proceeding shows that the problem – the alleged slow pace of broadband deployment – that the Commission targets its drastic proposals to solve does not exist. At the same time, the harm that will result if the Commission loosens its regulatory safeguards in the manner it has proposed is very real. Commenters submitted evidence that the ILECs continue to discriminate against unaffiliated ISPs even today, with current safeguards in place.[12] And, SBC continues to rack up more fines for discriminating against competitors, entering into a

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9 *See, Verizon v. FCC* slip op. at 63.

10 *Id.* at 45-46.

11 *See infra* Section VII.

12 Comments of DirecTV Broadband, Inc., 7-20.

consent decree to pay the U.S. Treasury $3.6 million just last month to close an investigation into violations of sections 251, 271, a prior consent decree, and sections 1.17 and 1.65 of the Commission's rules.[13] Existing safeguards must not be abandoned, but rather should be strengthened and more vigorously enforced. Accordingly, the Commission must reject the Notice's tentative conclusions.

D. The Drastic Change in Policy Proposed in the Notice Would Not Withstand Judicial Scrutiny

The Joint Commenters and many other commenters recognize that the Notice's proposals would represent a reversal of decades of settled law reflected in the Commission's *Computer Inquiries*.[14] Many commenters noted, as did the Joint Commenters, that the Commission itself already expressly held that advanced services such as DSL are telecommunications services and, to the extent such services consist of a telecommunications service element and a information services component, those components can be addressed and regulated separately.[15] Like the Joint Commenters, these commenters observed that the Commission's prior holding was upheld by the Court of Appeals, and is diametrically opposed to the view proposed in the Notice.

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13 *See In the Matter of SBC Communications, Inc., Order,* EB-01-1H-0339 et al, (rel. May 28, 2002).

14 *See* WorldCom Comments at 7-8, AT&T Comments at IV, Ohio PSC Comments at 3, Covad Comments at 37-38, ASCENT Comments at 3.

15 Covad Comments at 72-74, WorldCom Comments at 58-59, Ohio PSC Comments at 5-6, KMC and NuVox Comments at 4-8.

Courts apply a heightened standard of review where, as here, an agency proposes to change existing policies.[16] Under *State Farm,* a reviewing circuit will require that the agency's decision be "rational, based on the consideration of the relevant factors and within the scope of the authority delegated to the agency by statute."[17] The Notice proposes to apply a solution that recent history demonstrates will harm competition and fail to spur broadband deployment in order to solve a problem – the alleged slow pace of broadband deployment – that does not exist. Based on this record, such a decision would not be rationale. Moreover, such a decision would be beyond the scope of the Commission's authority, as it would be an unlawful attempt to forbear from the provisions of Section 251 of the Act before that section has been fully implemented.[18] Accordingly, the Commission would be unable to justify the Notice's proposals under the *State Farm* standard.

III. THE COMMISSION'S PROPOSED INTERPRETATION CONFLICTS WITH THE ACT'S STRUCTURE AND PURPOSE, AS IT THREATENS TO MAKE CENTERPIECE PROVISIONS OF THE ACT SUCH AS SECTIONS 251 AND 255 OBSOLETE

As recognized in *Verizon v. FCC*, the Act's purpose was to create robust competition in telecommunications markets, and the Act's method was to impose obligations on ILECs that required them to open their networks for use by competitors. Numerous commenters observe that the Commission's tentative conclusion, which would exempt ILECs from these market opening provisions where they claim to be providing broadband services, simply cannot

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16 *See Motor Vehicle Mfg. Assoc. of the United States v. State Farm Mut. Auto. Co.*, 463 U.S. 29, 42-43 (1983) ("*State Farm*"); *see also United Church of Christ v. FCC*, 707 F.2d at 1425 ("abrupt shifts in policy do constitute *danger signals* that the Commission may be acting inconsistently with statutory mandate").

17 *State Farm*, 463 U.S. at 42-43.

be squared with the language and structure of the Act.[19] But there are other stakeholders, in addition to competitive providers of telecommunications services, whom Congress intended the Act's provisions to help. These stakeholders include the disabled community, who have a key interest in Section 255, and the law enforcement and national security community, whose primary concern is CALEA. Should the Commission ignore Congress' mandate in order to confer unneeded benefits on the ILECs, it will harm the disabled, law enforcement, and national security in addition the harming to competitive providers of telecommunications.

As many state commissions and communications providers, including KMC and NuVox, point out, adoption by the Commission of the tentative conclusions set forth in the Notice would render the key market opening provisions of the Act obsolete.[20] The existence of Section 706 shows that Congress was aware that advanced services existed when it wrote the Act, and it is therefore unthinkable that Congress would have intended sections 251 and 252, the Act's centerpieces, to be so easily subverted.

Many non-communications providers also noted that the policies proposed in the Notice would strip away other key elements of the Act and other law, such as CALEA and the Act's disability protections. A few of these conflicts are noted below:

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18 *See* 47 U.S.C. § 10(d).

19 Ohio PUC Comments at 16, 25; California PUC Comments at 15, 24; *ASCENT Comments* at 31.

20 Ohio PUC Comments at 36; California PUC Comments at 44; Covad Comments at 23, 25; WorldCom Comments at 32.

- For instance, the Department of Justice and the FBI stated that the Commission's proposed conclusion that there is no "telecommunications service" component to broadband Internet access would render CALEA obsolete.[21]
- Telecommunications for the Deaf, Inc. ("TDI"), a national organization that advocates on behalf of deaf citizens, asserts that if the Commission follows through on its proposals from the Notice, "telephone companies would certainly be granted . . . the freedom to discriminate against individuals with disabilities" because Section 255 would no longer apply, and urges the Commission not to take such a "radical" step. TDI Comments at 2.
- The American Foundation for the Blind ("Foundation for the Blind") similarly notes that "the consequences for people with disabilities will be severe" should the Commission exempt an entity that provides both telecommunications services and information services from the obligations of Section 255 of the Act.[22]

As numerous commenters have observed, the Commission's proposals in the Notice would have the unintended effect of making many key provisions of the Act meaningless. An interpretation of the Act that would exempt ILECs from these core provisions of the Act cannot be considered reasonable. Such an interpretation would not be entitled to *Chevron* deference, as it cannot be squared with the Act's structure and purpose.

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21 FBI/Department of Justice Comments at 7.

22 Foundation for the Blind Comments at 11.

IV. THE SUPREME COURT'S RECENT DECISION IN *VERIZON V. FCC* COMPELS REJECTION OF THE ILECS' REGULATORY PARITY ARGUMENTS

The Notice's premise that ILECs are subject to asymmetric regulation and must therefore be freed of market-opening regulations in order to thrive conflicts with *Verizon v. FCC*. The Supreme Court recently made clear that the 1996 Act imposes additional obligations on ILECs to break their bottleneck control over loops. *See Verizon v.* FCC at 63. There exists nothing in this record that would justify a loosening of these restrictions that Congress imposed upon the ILECs. As shown below, loosening these restrictions will not result in greater broadband deployment, only in less competition and higher broadband prices for consumers. *Verizon v. FCC* therefore compels that the ILECs' regulatory parity arguments must be rejected.

A. Congress Intended for ILECs to Be Subject to Additional Regulation in Order to Make Competition Possible

Fundamentally, the Notice's theory of broadband deployment rests on the invalid premise that ILECs are victims of discrimination that must be "helped out" by the Commission in order to compete. The ILECs in their comments also make the claim that they are subject to asymmetric regulation. In fact, as *Verizon v. FCC* recognizes, ILECs are treated differently for a reason: they possess market power that they can use to obstruct competition, and therefore, it is appropriate that they be subject to differential regulation. Accordingly, ILEC arguments that they deserve "help" from the Commission in order to compete must be rejected.

The Supreme Court makes clear that the Act was intended to be groundbreaking, not timid, in its approach to regulating ILECs. Congress's goal was "to reorganize markets by

rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets."[23]

Verizon v. FCC made clear that Congress' goal in the 1996 Act was to *enable* competition, and not to throw roadblocks in competitors' paths, as the Notice proposes to do. In *Verizon v. FCC* the Supreme Court rejected any notion that the ILECs are entitled to "regulatory parity." Rather, each type of carrier is intended to be regulated in a particular way under the Act, with ILECs in particular, singled out – *by Congress* – for *additional* obligations.[24] Congress goal in enacting the Act was "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[25] The proposals contained in the Notice, which seek to ease the "burden" Congress rightfully placed on the ILECs, are wholly inconsistent with Congress's goal. Accordingly, the Commission must reject the ILECs' regulatory parity arguments.

Congress took aim at the ILECs for good reason: because, as the Supreme Court recently explained, the ILECs' control over local loops gives them "an almost insurmountable competitive advantage" over CLECs:

> It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U.S.C. §251(h)), would have an almost insurmountable competitive advantage . . . . A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly

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23 *Verizon v. FCC* slip op. at 16.

24 *Id.* at 63 ("The Act . . . proceeds on the understanding that incumbent monopolists and contending competitors are *unequal*," and are expressly given additional obligations by Section 251 (emphasis supplied))

25 *Id.* at 17.

> and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.[26] *Id.* at 18.

As the Supreme Court recognized, the ILECs' Title II obligations exist because control over loops and other facilities give the ILECs an "almost insurmountable" competitive advantage. *Id.* Because they hold this advantage, the ILECs do not need or deserve "help" from regulators. Rather, the Act itself was designed to erode the ILECs' advantage and level the playing field. For the Commission to succumb to the ILECs' regulatory parity arguments would undermine the Act's primary purpose of providing both the incentive and ability for competition by removing the ILECs' "insurmountable advantage."

That the ILECs continue to hold this competitive advantage is amply supported by the record of this and related proceedings. The entire period since the Act's enactment has been marked by ILEC misconduct directed at CLECs. The Commission made findings recognizing this fact on the record – in fact in prior and very recent – proceedings.[27] Commenters in *this* proceeding have noted that ILECs continue to discriminate against unaffiliated carriers in violation of the Act. Even during the short time the instant proceeding (CC docket 02-33) has been pending, the Commission imposed a multimillion dollar penalty on SBC in the form of a consent decree as a result of SBC's alleged violation of the Commission's rules. At the same time, many CLECs have gone bankrupt or have otherwise suffered financial difficulties in no small part because of the entry barriers foisted upon them by ILECs. In light of these facts, the idea that somehow these incumbent monopolists need "help" from the Commission in the form

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26 *Verizon v. FCC*, slip op. at 18.

27 *See* Joint ILEC Broadband Comments at 6-8.

of "regulatory parity" in order to compete with CLECs is a stunning departure from reality, and conflicts with what the Supreme Court said was a "commonsense" conclusion.

It should have been clear even prior to *Verizon v. FCC* that the ILECs, the carriers with the largest amount of customers, the best financing, and control of the bottleneck elements, should not require, nor be entitled to, any assistance from regulators in their contest for customers with competitors. The Joint Commenters and others made this commonsense argument in their ILEC Broadband proceeding comments. Prior to *Verizon v. FCC*, it would have been wise for the Commission to reject the ILECs' regulatory parity arguments because the ILECs provided no factual support in this proceeding or in ILEC Broadband for their claims that regulation was preventing them from deploying facilities. If the Commission possessed any doubt as to whether it should retain the regulatory regime Congress designed to curb ILEC market power, the Supreme Court in *Verizon v. FCC* has now settled the issue, and has dispelled any notion that regulatory parity is a desirable, or even permissible, statutory goal.[28]

B. The ILECs' Claim that they Are Subject to Disproportionate Regulation is Demonstrably False

Moreover, the idea that the ILECs are subject to asymmetric regulation has been proven false by the record. Each industry segment is subject to regulation that is appropriate. The 1996 Act was a comprehensive piece of legislation that fully anticipated that cable providers would compete with wireline telecommunications providers. The differing treatment of these two providers was fully intended by Congress. To pretend Congress somehow overlooked this

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[28] While it is permissible under the Act for the Commission to forbear from applying Section 251's market opening provisions, the Commission may do so only after Section 251 has been fully implemented. No commenter has suggested that Section 251 has been fully implemented, nor would the record support such a finding.

possibility would be to ignore history. As the Supreme Court has held, "the Act . . . proceeds on the understanding that incumbent monopolists and contending competitors are *unequal*."[29]

The ILECs' claims that they deserve less regulation ring especially hollow in light of the fact that *no* carrier today is totally free from Commission regulation. The Commission has imposed stringent regulation on CLECs, regulating the prices CLECs can charge for access and reciprocal compensation. Cable companies face regulation under Title VI according to Congress' mandate. Accordingly, the ILECs' claims that they alone are subject to regulation which must be removed to create parity between ILECs and other carriers cannot withstand scrutiny.

C. ILEC regulatory parity arguments must be rejected because the Commission's role is to foster competition, and not to aid individual competitors such as the ILECs

It has always been true that the Commission's role is to foster competition, not to aid individual competitors.[30] The Commission always has followed this mandate, and it should continue to do so now by rejecting ILEC pleas for differential treatment. Although the Act is "deregulatory," it is so "in the intended sense of departing from traditional 'regulatory' ways that coddled monopolies."[31] However, the Notice's proposals would do just the opposite, coddling the ILECs by exempting them from the key market opening provisions that form the Act's centerpiece. Given that *Verizon v. FCC* recognized that Congress imposed regulation on ILECs

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29 *Verizon v. FCC* 535 U.S. _____, slip. op. at 63 (emphasis supplied).

30 Even before the 1996 Act, both the FCC and this Court observed that "the goal of the agency 'is to promote competition . . . not to protect competitors.'" *Competitive Telecom. Comm'n v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996) (*quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* 59 RR 2d 1418, 1434-35 (1986)).

for a good reason – to promote competition – it would be perverse for the Commission to use the Act as a basis for assisting the ILECs at the expense of competition and competitors.

The policy the ILECs seek to have the Commission adopt demonstrably will not work, and the ILECs have submitted no credible evidence that it will. As several commenters observed, the ILECs cannot really be seeking de-regulation of broadband Internet access services, because Internet access already *is* unregulated. Rather, what they seek is to evade are their core Title II obligations as common carriers, imposed on them because of their market power in telecommunications services. At the same time, other commenters, including state commissions, carriers, individual consumers, and ISPs, have shown that ILECs are abusing their control over bottleneck facilities to the detriment of consumers and competition *today*, even with the Title II regulation in place.

The Commission must consider its mission when seeking to alter the regulatory scheme. That mission is to protect consumers by creating competition, and not to ensure that the ILECs and their investors may continue to earn monopoly rents. The Notice's proposals represent merely an attempt to "coddle" incumbent monopolists while hamstringing their competitors. Such an approach conflicts with *Verizon v. FCC.*

D. The ILECs are not entitled to a risk-free environment for deploying broadband

According to Verizon, Title II wholesale regulations should be done away with because they "allow competitive local exchange carriers to free-ride on telephone company investment at artificially low rates, while forcing telephone company shareholders to bear the full

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[31] *Verizon v. FCC*, 535 U.S. __ slip op. at 31.

costs of any investment that fails," and that "this disparate treatment of investment successes and failures undermines the incentive to undertake costly and risky investments in innovation."[32] Essentially, Verizon's argument is an attack on TELRIC pricing. By now, *Verizon v. FCC* has thoroughly repudiated any claim that TELRIC prices are "artificially low," and Verizon's argument should be rejected on this ground alone.

However, Verizon's argument that ILECs should be insulated from all risk in deploying broadband facilities also founders on fact. It is no riskier to deploy broadband facilities for the CLECs, who are doing so, than for the ILECs, who claim they need regulatory help. Most of the facilities needed to provide DSL are the same copper wires that already are in place. Because of the 1996 Act, the days of monopoly are over, and with them the days of a guaranteed return on investment. In a competitive market, no business is entitled to a risk free environment or a guaranteed return. *Verizon v. FCC* makes clear that the Act's purpose was to replace the monopoly paradigm with a competitive one. The idea that the regulator should remove all risk from a venture to make it easier for one dominant provider to build facilities is an idea that belongs to the monopoly paradigm, not the competitive one. The Act chose instead the competitive paradigm, and deliberately placed the ILECs' monopolies at risk. The Commission does not possess authority to override this legislative choice.

V. THE SUPREME COURT DEBUNKED THE IDEA THAT INTERMODAL COMPETITION IS SUFFICIENT TO PROTECT CONSUMERS

The Notice suggests intermodal competition as a means of holding in check ILEC dominance. However, the Supreme Court's analysis in *Verizon v. FCC* relies on the latest

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[32] Verizon Comments at 19; *see also* SBC Comments at 30.

Commission statistics to show that, because so little intermodal competition exists at present, the potential for intermodal competition to erode the ILECs' bottleneck over loops remains years away.

As the Court stated, the local loop "was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used."[33] Thus, the Court recognizes that the primary way that carriers access customers is through ILEC-provided local loops. These are the same loops at issue here, which can be used not only to provide "plain old telephone service " ("POTS"), but also to provide broadband by means of DSL, and which the Court stated provide ILECs with a "nearly insurmountable" competitive advantage over their rivals.[34] As the Court noted in its analysis concerning the importance of ILEC-provided loops, the amount of loops available from sources other than the ILECs, such as from intermodal competitors, is negligible:

> Some loop lines employ coaxial cable and fixed wireless technologies, but these constitute less than 1 percent of the total number of reported local-exchange lines in the United States.[35]

Thus, the Court's opinion recognizes that in 99 percent of all cases, local loops will be supplied – and controlled – by the ILECs.

Later in its opinion, in countering a point made in Justice Breyer's dissent, the Court once again highlights the fact that intermodal competition to ILECs is "negligible at present."[36] As the Court stated:

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33 *Verizon v. FCC* slip op. at 17.

34 *Id.* at 18.

35 *Id.* at 17.

36 *Id.* at 49.

> Justice Breyer makes much of the availability of new technologies, specifically, the use of fixed wireless and electrical conduits, . . . but the use of wireless technology in local-exchange markets is negligible at present (36,000 lines in the entire Nation, less than 0.02 percent of total lines, FCC, Local Telephone Competition: Status as of June 30, 2001 (Feb. 27, 2002) (table 5)), and the FCC has not reported any use whatsoever of electrical conduits to provide local telecommunications service.[37]

In this part of its opinion, the Court cited these figures to show that the "threat" of obsolescence of ILEC loop facilities was not a serious one.[38] But the Court's observations concerning the inroads – or lack thereof – made by intermodal competitors is relevant to this proceeding. In its analysis, the Court highlights the fact that intermodal competition to ILECs – at least in the local exchange – is in its infancy today. Given this reality, highlighted by no less of an authority than the Supreme Court, an approach that relies on intermodal competition as a substitute for Title II of the Act would be imprudent at best.

The Court's observation is consistent with the Joint Commenters' direct experience in the marketplace. As noted in the Affidavit of Ed Cadieux, ILECs traditionally have failed to serve the small/medium-sized business market and, as a result, these customers frequently have few, if any, alternatives for high speed internet access.[39] For instance, high speed cable modem service is not available as a competitive alternative for small/medium-sized business customers for high speed internet access service in most of the 30 city markets that NuVox serves[40] and, even where the serving cable company has upgraded its cable plant and is

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37 *Verizon v. FCC* slip op. at 49.

38 *See id.*

39 Affidavit of Ed Cadieux, Vice President Regulatory and Public Affairs, NuVox Communications, at ¶ 6 ("Cadieux Affidavit"), attached hereto.

40 Cadieux Affidavit at ¶ 9.

offering high speed cable modem service, in most instances the service is offered predominantly (if not exclusively) to residential customers.[41]

In addition, in the limited number of markets where the serving cable company has begun to offer high-speed cable modem service to business customers, the geographic scope of that offering frequently is limited and is significantly smaller than broadband service area offered by the ILEC or by NuVox or by other non-cable broadband carriers.[42] As a result, the vast majority of small/medium-sized business customers in NuVox's 30 market service area have only wireline options (ILEC DSL or CLEC integrated T-1 or DSL services) for broadband service.[43]

NuVox and KMC made the same point about the absence of intermodal competition in the business market in their ILEC Broadband proceeding comments.[44] In fact, in that proceeding, SBC's economic expert also admitted that cable modem service was not a factor in the business market.[45] There simply is no credible evidence that intermodal competition is a factor at all in the small and medium sized business markets. Accordingly, the Commission cannot rely on intermodal competition as a substitute for the requirements of Title II of the Act.

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41 *Id.*

42 *Id.*

43 *Id.*

44 Reply Comments of NuVox, KMC and Cbeyond, CC Docket No. 01-337, filed April 22, 2002 at 7-8.

45 *Id.* at 7.

VI. THE NOTICE'S PREMISE THAT DEREGULATION OF THE ILECS WILL LEAD TO INCREASED BROADBAND DEPLOYMENT IS CONTRADICTED BY THE RECORD OF THIS AND OF THE ILEC BROADBAND PROCEEDING

The ILECs argue that they will increase their deployment of broadband facilities if the Commission follows through on its proposal to interpret away the "telecommunications services" component of broadband Internet access. NuVox and KMC devoted many pages of their ILEC Broadband comments to documenting that the RBOCs, and SBC in particular, often promise regulators that they will deploy broadband services in return for reduced regulation, but never honor these promises.[46] NuVox and KMC refer the Commission to the extensive discussion of this issue in those comments, and will only briefly reprise them here. As demonstrated in those comments, the only way to *assure* that broadband will be deployed is to rely on competition from CLECs.[47] In contrast, the technique of relying on the "honor system" to foster deployment has been proven not to work, and it is easy to see why: absent competition, the ILECs have no incentive to deploy broadband, because they can make more money by keeping broadband prices as high as possible while selling second phone lines for narrowband access.[48] History shows that the likely result of offering deregulation as a *quid pro quo* for

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46 Comments of Cbeyond and NuVox in CC Docket 01-337, at 12-33. KMC participated with Cbeyond and NuVox in the reply round of that proceeding and endorsed the initial comments submitted by Cbeyond and NuVox.

47 *See id.*

48 *See* Reply Comments of NuVox, KMC, and Cbeyond in CC Docket No. 01-337, filed April 22, 2002 at 5 (citing to AT&T comments in CC Docket No. 01-337 at 44).

broadband deployment will be broken promises, just as when certain ILECs failed to follow through on earlier promises to provide broadband or out-of-region competition.[49]

A. The History of RBOC Capital Expenditures Demonstrates That Enforcing the Rules of Fair Competition is a Proven Way to Incent Deployment of Facilities

In their ILEC Broadband proceeding comments, the Joint Commenters documented the relationship between ILEC capital expenditure spending and the presence of competition, and will briefly reprise those arguments here.[50] Suffice it to say that the ILECs increased capital expenditures when competition was present and retrenched when the level of CLEC competition decreased. For instance, from 1997 through 2000, the BOCs' aggregate investment in facilities totaled $100 billion, a 22 percent increase over their investment made during the four years preceding the passage of the Act.[51] During that same period, the CLEC industry as a whole invested $55.9 billion in local facilities.[52] However, after 2000, when several notable data CLECs exited the market due to bankruptcies, the BOCs curtailed their investments significantly.[53]

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49 *See* Comments of Comments of Cbeyond and NuVox in CC Docket 01-337, at 18-19 (documenting SBC's failure to follow through on commitments to compete out of region).

50 *Id.* at 13-26.

51 *Id.* at 13 (citing *Telecommunications @ the Millenium*, Figure 10, Federal Communications Commission (Feb. 8, 2000) (BOC data for 1992-1999); *Statistics of Communications Carriers 2000/2001*, Table 2.7, Federal Communications Commission (Sept. 1, 2001) (BOC data for 2000).

52 *Id.* at 13 (citing *State of Local Competition 2001*, Association for Local Telecommunications Services (ALTS), Feb. 2001). CLECs' capital expenditures drew dramatically from $5 billion in 1997 to $9.2 billion in 1998, and $15.1 billion in 1999.

53 *Id.*

The Supreme Court used these very CLEC investment figures – the $55.9 billion in investment from ALTS' *State of Local Competition 2001* report – as evidence that the current regulatory framework was working.[54] The Supreme Court characterized the idea that ILECs would be incented to invest in facilities as long as competitors were present was a matter of pure commonsense.[55] In contrast, the idea that the ILECs will spend money to deploy facilities when their competition is gone is counterintuitive, as well as inconsistent with recent history.

The idea that the BOCs would increase network investment in response to competition is, as the Supreme Court said, commonsense. The idea that they would retrench in the absence of competition also is commonsense, and was predicted in a published analysis at the time:

> [T]he ILECs are arguably more secure in their local franchise monopolies today than they have been in a decade. That's because the presumed threats to their local business have eroded rapidly over the past several months . . . . As a result, we think the ILECs may feel less pressure to aggressively pursue any costly new revenue streams, including DSL.[56]

With so much evidence as to the likely consequences of its decision, this Commission should rely on commonsense and reject the Notice's counterintuitive proposals.

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54 *Verizon v. FCC* slip op. at 45-46.

55 *Id.* at 46 n. 33.

56 *Reassessing the Profitability of High-Speed Data*, Banc of America Securities (May 7, 2001).

B. Using Deregulation as a Quid Pro Quo to Incent Deployment Will Not Work, as ILECs Routinely Break Promises Made In Return for Deregulation

As has now been exhaustively proven in this proceeding and in ILEC Broadband, the ILECs never follow through on their promises of deployment made to regulators.[57] This pattern of behavior stretches back nearly 20 years.[58] As we discussed this issue extensively in our prior comments, these replies shall only briefly highlight some recent occurrences. For instance, as noted in the Wall Street Journal, SBC failed to follow through vigorously on its commitment to provide local competition outside its region.[59] Despite assurances it made to regulators that it intended to compete, SBC closed its office in Atlanta in 2001 only two weeks after it opened, and made similar retrenchments in Seattle and Tampa.[60]

SBC also has repeatedly refused to rollout its broadband service unless regulators allow it to do so in a way that excludes its competitors. As one state regulator remarked, SBC's unwillingness to deploy broadband service unless regulators meet SBC's terms shows SBC has a monopoly on this service.[61] That SBC delayed its rollout in the first place shows it has market power. If competition from CLECs existed – as it did prior to data CLEC competitors such as

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57 *See* Comments of Cbeyond and Nuvox in CC Docket 01-337, at 18-19.

58 Comments of Cbeyond and Nuvox in CC Docket 01-337, at 25-27 (noting BOC failures to deploy ISDN service in the mid-1980s, and Ameritech's broken promise to Indiana regulators that it would deploy broadband fiber optic facilities as part of a program calls "Answer Indiana").

59 *See* Shawn Young, Yochi J. Dreazen, Rebecca Blumenstein, "Familiar Ring: How Effort to Open Local Phone Markets Helped the Baby Bells, An Aggressive SBC Thrives Under New Regulations; A Trend to Oligopolies, Slowing Rollout of Broadband," Wall Street Journal, Feb. 11, 2002 at A14.

60 *Id.*

61 *Id.* at A14 (quoting Terry Harvill, head of the Illinois Commerce Commission, for SBC to "withhold DSL from that many people is really concrete evidence that you're dealing with a textbook monopolist.").

Covad, Northpoint, and Rhythms NetConnections having to retrench their operations[62] – SBC would be not only rolling out service, but lowering prices to meet its competition as well.

In fact, none of the BOCs have ventured aggressively into other BOCs' markets to compete as CLECs. That this expansion has not occurred despite the absence of any law or regulation underscores the fact that regulation is not a deterrent to entry. Rather, these carriers will deploy broadband facilities only when faced with a competitive threat that forces them to defend their home turf.

C. The ILEC's claim that they are "newcomers" to broadband is frivolous

The ILECs have the temerity to claim that they are "newcomers" to provision of broadband services, claiming that cable providers at present have a larger total share of the broadband market.[63] The ILECs offer no other support for their view that they are "newcomers" to provision of broadband, and indeed, the idea that these incumbent monopolists are "newcomers" to the provision of high capacity telecommunications services is ludicrous. ILECs have provided high capacity services, whether T-1s, DS-3s, or higher capacity services – each of which would be considered broadband under any definition – for decades. As pointed out by Covad and others, once the ILECs were forced to deploy DSL by the competitive threat posed by CLECs, the ILECs quickly increased their share of the market from 0 to a market-dominating 93

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62 NorthPoint Communications and Rhythms NetConnections have sold substantially all of their assets to AT&T and WorldCom, respectively, under Chapter 11 of the U.S. Bankruptcy Code. See Amid Layoffs, NorthPoint Ordered to Keep Operating, Telecommunications Reports (Apr. 2, 2001); WorldCom Gets Bankruptcy Court Approval to Buy Most Assets of Rhythms NetConnections, TR Daily (Sept. 26, 2001). Covad has recently emerged from bankruptcy proceeding. Covad's Line Count, Last-Mile Telecom Report (Feb. 1, 2002).

63 *See e.g.,* Verizon Comments at 2.

percent.[64] The record indicates that the ILECs' deployment of DSL, a technology which the ILECs invented in the 1980s, but kept on the shelf until the late 1990s, when competition from CLECs forced them to deploy it.[65]

As is well documented in NuVox and KMC's comments in the ILEC Broadband docket, ILEC deployment of broadband facilities occurred solely as a response to the competitive threat posed by CLECs, and there is no evidence to support the ILECs' view that the presence or absence of any regulations played any role in this process. In addition, although the ILECs' share of the broadband market may lag behind cable, as explained by many commenters in the record of the ILEC Broadband proceeding, and this proceeding, the ILECs' lack of market share compared to cable stems from the fact that they increased their DSL prices, thereby undercutting demand for the services.[66]

The record contains no credible evidence to support the ILECs' arguments that regulation is somehow holding them back from deploying broadband. Similarly, there is no record support for the idea that the competitive safeguards that the Notice would dispense with are not needed. And, as amply supported in the record, the ILECs invented xDSL, but refused to deploy it for nearly a decade until faced with the threat of losing customers to competitors that

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64 Covad Comments at 3.

65 Illinois Commerce Commission Comments at 12 ("Roughly one year ago, at the time many financially distressed CLECs were first departing the market, SBC raised its monthly broadband services rates.")

66 Comments of Cbeyond and Nuvox in CC Docket 01-337, at 22 (detailing how all four RBOCs raised DSL prices in 2001, a year after several major data CLECs exited the market); *see also* Illinois Commerce Commission Comments at 12 (referencing SBC's DSL price increase).

were deploying DSL.[67] The ILECs cannot be considered "newcomers" to the market merely because they were afraid to deploy DSL because it would cannibalize their other broadband services such as T-1s and other services. These ILEC-provided services are, and always have been, broadband services that the ILECs have dominated. Adoption of the proposals in the Notice will further entrench their market dominance.

As in the ILEC Broadband proceeding, the ILECs' contentions that they lack market power are contradicted by the evidence. The ILECs' claims that they are "newcomers" rely solely on the alleged presence of competition from cable providers, which, as shown herein, is minimal in the markets served by the Joint Commenters.[68] Because of their reliance on cable and other intermodal competition, the ILECs' arguments also depend on the Commission ignoring the Act's command that *wireline* competition be created. However, the Commission may not ignore the Act's dictate to create wireline competition without running afoul of the Supreme Court's interpretation of the Act in *Verizon v. FCC*. The Act requires in*tra*modal competition because it "proceeds on the understanding that incumbent monopolists and contending competitors are unequal," and it imposes additional obligations on ILECs in order to remove the ILECs' inherent competitive advantage.[69]

Under the Act's plain terms, this Commission cannot allow the ILECs to evade bedrock provisions of Title II, such as its section 251 unbundling obligations "until . . . those

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67 Comments of Cbeyond and Nuvox in CC Docket 01-337, at 4 (citing Yochi J. Dreazen, Greg Ip, Nicholas Kulish, "Big Business, Why the Sudden Rise In the Urge to Merge And Form Oligopolies," Wall Street Journal, February 25, 2002, A1, at A10).

68 These claims also ignore the ILECs' unquestioned dominance in the wholesale market for inputs used by other carriers to provide DSL.

69 *See Verizon v. FCC* at 63.

requirements have been fully implemented,"[70] and the claim that section 251 has been fully implemented simply cannot be made on this record. In addition, as the Supreme Court also recognized, as a factual matter, that intermodal competition to the ILECs is "negligible" at present for the copper twisted wire pair and fiber optic cables used to provide broadband.[71]

The ILECs have submitted no credible evidence that their theory of deregulation will result in increased broadband deployment, and their unsupported arguments are contradicted by hard evidence submitted by other commenters in this and other proceedings. As several commenters observed, the ILECs cannot really be seeking de-regulation of broadband Internet access services, because Internet access already *is* unregulated. Rather, what they seek is to evade are their core Title II obligations as common carriers, imposed on them because of their market power in telecommunications services. This the law does not allow.[72]

ILECs remain subject to regulation because Congress recognized that they are in a different position than CLECs.[73] For the Commission to pretend that ILECs are "newcomers" to the provision of broadband telecommunications services simply does not comport with reality. As the Supreme Court recently recognized, Congress *imposed* regulation on ILECs because of their control of bottleneck facilities.[74] As demonstrated above, it is not possible as a legal matter for the Commission to deregulate ILECs in the manner proposed in the Notice because that action would conflict with the Supreme Court's interpretation of the Act and because such a

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70 47 U.S.C. § 10(d).

71 *See Verizon v. FCC* at 45-46.

72 *See* 47 U.S.C. § 10(d).

73 *Verizon v. FCC* slip op. at 63.

74 *Id.* at 18.

drastic policy change could not be justified under *State Farm*. The record of this and the ILEC Broadband proceeding also make clear that the Notice's proposals would be equally unwarranted as a policy matter, because history shows that such policies will not work.

VII. AS MANY COMMENTERS HAVE CORRECTLY OBSERVED, UNDER THE 1996 ACT, THE AVAILABILITY OF UNES IS DEPENDENT ON HOW THE *REQUESTING CARRIER* USES THE UNES AND NOT ON HOW THE ILEC USES THEM

If the Commission should decide to reject the good counsel of multiple state commissions, the Department of Justice and the FBI, numerous comments submitted by individual citizens, and the CLEC industry and nonetheless embarks on its legally suspect course of finding that there exists no "telecommunications service" component to broadband, the Commission should not commit the further mistake of using that conclusion to deny or restrict the ability of requesting carriers to obtain UNEs. The Joint Commenters agree with AT&T, WorldCom, and others, that it is the *requesting carriers'* use of a UNE that determines whether a UNE shall be available, and if requesting carriers intend to provide at least some telecommunications services by using a UNE, those carriers should be permitted to obtain the UNE and use it for all purposes.[75]

Any interpretation of the Act that forecloses use of UNEs to provide broadband simply cannot be squared with the Act's purposes. As many commenters correctly noted, a policy that

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[75] *See* WorldCom Comments at 75 ("the only restriction Congress imposed on the use of UNEs was to require that they be utilized at least in part "for the provision of a telecommunications service. . . . As long as a competitor uses the leased element in part to provide a telecommunications service, the FCC cannot further limit the uses to which the carrier puts those elements."); *see also* AT&T Comments at 29.

would prevent requesting carriers from obtaining UNEs would be illegal.[76] This is even more true after *Verizon v. FCC*. Section 251(c) places obligations on *Incumbent Local Exchange Carriers*, a term of art defined in sections 3(26) and 251(h) of the Act in terms of when a carrier began providing local exchange and exchange access service. Accordingly, a carrier could not evade 251(c)(3)'s obligations by ceasing to provide "telecommunications services," because that carrier would remain an "ILEC" under the statutory definition because ILEC status is independent of whether a carrier provides "telecommunications services." Courts already have held that ILEC status is sufficient to trigger the duty to unbundled network elements.[77]

Moreover, any policy that would prevent CLECs from making use of UNEs cannot be squared with the Supreme Court's interpretation of the Act as intended to remove practical barriers to competition.[78] Accordingly, the availability of UNEs is based on the use that the requesting carrier seeks to make of the UNE, and is not dependent on how the ILEC uses the elements.

VIII. CONCLUSION

Numerous commenters observed that the Notice's proposed conclusion, in addition to being bad policy, conflicts with decades of Commission precedent. With the issuance of the latest Supreme Court rulings, finally there exists some certainty concerning the rules of local competition. The Notice threatens this certainty, and worse, raises the specter of years of continued litigation. Given the clear conflict of the Notice's proposed conclusion with decades

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76 *See, .e.g.*, ASCENT Comments at 31.

77 *See WorldCom v. FCC*, 246 F.3d 690, 695 (D.C. Cir. 2001).

of prior law, the likely result of adoption of the Notice's conclusions will be a lengthy appeals process which the Commission will lose, after which the industry is likely to be back where it started, and consumers will be worse off because of the wait.

USTA v. FCC notwithstanding, the Supreme Court's recent decision shows the Act should be read expansively to allow robust competition. The Commission's new interpretation would read the Act as only applying to POTs service, in conflict with Congress' intent. The Act should not be interpreted to erect practical roadblocks that prevent competitors from providing service. The Commission's tentative conclusion concerning information services, if adopted, would constitute just such a roadblock. The RBOCs' failure to deploy broadband, if any, has everything to do with demand, and nothing to do with supply, which is already adequate. And it certainly has nothing to do with any alleged regulatory asymmetry.

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[78] *See Verizon v. FCC,* 535 U.S. __ slip op. at 61 ("the additional combination rules are best understood as meant to ensure that the statutory duty to provide unbundled elements gets a practical result").

The ILECs are seeking complete freedom to discriminate and to monopolize. This Commission should not give it to them.

Respectfully submitted,

By: _____

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

DECLARATION OF EDWARD J. CADIEUX

I, Edward J. Cadieux, pursuant to 28 U.S.C. Sec. 1746, do hereby declare, under Penalty of Perjury, that the following is true and correct:

1. I am employed as Vice President of Regulatory and Public Affairs by NuVox, Inc. ("NuVox"). I have more than 20 years of regulatory, legal and public policy experience in the telecommunications industry.
2. My business address is 16090 Swingley Ridge Road, Suite 500, Chesterfield, Missouri 63017.
3. NuVox is facilities-based competitive local exchange carrier ("CLEC") and integrated communications services provider. NuVox offers voice, data and ancillary services to small and medium-sized business customers in 30 city markets across 13 Southeastern and Midwestern states. (A list of the markets served by NuVox is attached hereto as Schedule A.) Specifically, NuVox offers local voice and data services, dedicated high speed internet access,

domestic and international long distance services, and a variety of complimentary services including unified voice, e-mail and fax messaging, local area and wide area network management, virtual private networks, website design, web page hosting, audio conferencing and a comprehensive set of web-based applications.

4. NuVox has deployed its own switching and collocation-based transmission equipment, along with thousands of integrated access devices (i.e., specialized, customer premises equipment which permits bundled provision of voice and dedicated high speed internet access services over T-1 channels). NuVox has installed 30 ATM data switches and 14 Class-5 digital voice switches, and has 205 equipped and fully operational collocations in Bell Company central offices.

5. The vast majority of NuVox's customers subscribe to a bundled set of services which includes local and long distance voice services and dedicated high speed internet access services. NuVox provisions bundled voice and dedicated high speed internet access services via leased integrated T-1 facilities which connect with NuVox-owned integrated access devices (at the customer's location) and to NuVox's ATM data and digital voice switching equipment at its switching hubs.

6. By combining its own facilities with T-1 facilities leased from the serving ILEC, NuVox provides bundled voice and dedicated high speed internet access services over separate channels of an integrated T-1. Use of traditional T-1 facilities in this manner is efficient and economical, and allows NuVox to

offer customers the convenience of one-stop shopping for combined voice and high-speed internet access services. The efficiency of this configuration allows NuVox to bring both voice services and dedicated high speed internet access service "down-market" – i.e., by combining voice and internet access over an integrated T-1, NuVox is able to offer these services to business customers with as few as five voice lines. The small/medium-sized business market is a market segment that traditionally has been neglected by the serving ILEC. These customers frequently have few, if any, alternatives for high speed internet access.

7. NuVox has expanded its offering of integrated voice and dedicated high speed internet access services beyond its collocation "foot-print" by use of leased, ILEC-combined loop and transport T-1 facilities. Use of ILEC-combined loop/transport T-1 facilities allows NuVox to expand the geographic availability of its bundled voice/dedicated high speed internet access services to those small and medium-sized business customers that are located in central offices where collocation is not feasible. Generally these tend to be the central offices with relatively low business customer density. In these areas small/medium-sized business customers have limited (if any) alternatives to the serving ILEC for voice and high speed internet services. NuVox's use of ILEC-combined loop/transport T-1 facilities allows it to reach these customers and offer them competitively-priced voice and dedicated high speed internet access services.

8. NuVox's ability to bring competitively-priced bundled voice and dedicated high speed internet access service to the small/medium-sized business customer segment is highly dependent on its ability to obtain leased T-1 loops and -- for customers located outside of NuVox's collocation footprint -- ILEC-combined T-1 loop/transport combinations, at cost-based prices. To the extent ILECs are permitted to engage in policies that deny the availability of these facilities as UNEs and instead force NuVox to use tariffed T-1 special access service, the NuVox cost of providing integrated T-1 service is increased to unsustainable levels because ILEC special access services are price substantially in excess of the economically efficient (i.e., incremental) cost of the facilities.

9. High speed cable modem service is not available as a competitive alternative for small/medium-sized business customers for high speed internet access service in most of NuVox's 30 city markets. Where the serving cable company has upgraded its cable plant and is offering high speed cable modem service, in most instances the service is offered predominantly (if not exclusively) to residential customers. In the limited number of markets where the serving cable company has begun to offer high-speed cable modem service to business customers, the geographic scope of that offering is frequently limited and is significantly smaller than broadband service area offered by the ILEC or by NuVox or other non-cable broadband carriers. As a result, the vast majority of small/medium-sized business customers in

NuVox's 30 market service area have only wireline options (ILEC DSL or CLEC integrated T-1 or DSL services) for broadband service.

10. This concludes my declaration.

June 27, 2002

Edward J. Cadieux

NuVox Markets

- St. Louis, Missouri (and adjoining Illinois portion of metro area)
- Springfield, Missouri
- Kansas City, Missouri (and adjoining Kansas portion of metro area)
- Wichita, Kansas
- Little Rock, Arkansas
- Tulsa, Oklahoma
- Oklahoma City, Oklahoma
- Greenville, South Carolina
- Spartanburg, South Carolina
- Atlanta, Georgia
- Greensboro, North Carolina
- Burlington, North Carolina
- Winston-Salem, North Carolina
- Indianapolis, Indiana
- Akron, Ohio
- Wilmington, North Carolina
- Cincinnati, Ohio
- Columbus, Ohio
- Dayton, Ohio
- Lexington, Kentucky
- Miami, Florida
- Ft. Lauderdale, Florida
- Charlotte, North Carolina
- Raleigh, North Carolina
- Columbia, South Carolina
- Jacksonville, Florida
- Louisville, Kentucky
- Nashville, Tennessee
- Knoxville, Tennessee
- Charleston, South Carolina